

**MICROSOFT COMMENTS ADDRESSING
BEREC STRATEGY 2015-2017
AND
*BEREC WORK PROGRAMME 2015***

October 24, 2014

Microsoft appreciates the opportunity to comment on the *BEREC Strategy 2015-2017* and the *BEREC Work Programme 2015* documents (hereafter, collectively ‘BEREC documents’). Microsoft’s interest in BEREC’s work, the work of NRAs, and the work of the European Commission with respect to communications regulation reflects the breadth of Microsoft’s “cloud first” business worldview. Microsoft’s cloud services and applications include Azure (a cloud platform for the development, deployment, and management of online applications), OneDrive (a cloud-based storage application), Office 365 (a service providing online access to the Microsoft Office suite of productivity applications), Bing (an Internet search engine), Xbox Live (an interactive video game and entertainment service), and Skype. Indeed, nearly every aspect of Microsoft’s business is now connected in some fashion to the cloud.

Consumers and businesses use these services, applications, and related content not only on their home and work computers, but also while on the go using their smartphones, tablets, or other mobile devices. Indeed, mobile broadband has transformed the way companies do business with their customers. Microsoft and other cloud service providers are developing their businesses to thrive in this “mobile first, cloud first” world. BEREC’s efforts are fundamental to ensuring that innovation continues in all parts of the Internet ecosystem. Microsoft welcomes the opportunity to provide comments with respect to several specific aspects of the BEREC documents as identified below.

THE BEREC DOCUMENTS APPEAR TO UNDERVALUE CONTENT AND APPLICATION SERVICES

Microsoft is concerned about the tone the BEREC documents strike with respect to the relative merits of traditional network-tethered telecommunications services offered by telcos and other network operators and the rich variety of online and cloud services, applications, and content available on the Internet. The BEREC documents appear to portray online communications applications as a threat, or challenge, or problem to be addressed, rather than as valuable contributors to the overall benefit of society and therefore priorities to be promoted. This mode of thought emanates from what appears to be a network-primary or network-centric perspective as to where value lies in the realm of the Internet and thus where BEREC's priorities lie with respect to the creation and promotion of its strategic priorities.

It is critical that BEREC abandons any such limited perspective. BEREC should re-orient its philosophy to a more holistic appreciation of the benefits of all facets of the Internet ecosystem. And, it should adopt strategies and effectuate a work programme consistent with such a philosophy. In particular, consistent with the layered nature of the Internet ecosystem, BEREC should acknowledge that there is significant value both in and on networks, and, rather than perceive any part of the Internet as a threat, BEREC should adopt policies and positions that seek and promote value throughout the entirety of the Internet ecosystem.¹ In particular, with respect to positive strategic values and priorities such as innovation and investment, BEREC

¹ See David Tennenhouse and Sharon Gillett, *What about Innovation?*, InterMEDIA, Vol. 42, Issue 1 (Spring 2014) for many of the ideas herein concerning the importance of innovation on and in the network as a primary policy goal of regulators. Available at http://www.iicom.org/resources/doc_details/458-what-about-innovation

should strive to promote such values and priorities at all levels of the Internet, not merely in last mile physical networks.

Content and Applications Providers (CAPs) are themselves significant contributors of value on the Internet. Indeed, CAPs are just as integral a part of the Internet ecosystem as are ISP last mile networks and all other components that make up the various layers of the Internet. Conversely, CAPs (incl. cloud service providers) drive significant investment in much of the physical networks, equipment, and infrastructure that comprise the network of networks that is the Internet.²

Moreover, the BEREC documents presume a false dichotomy between services provided by network operators and by CAPs. From cloud storage services offered by Orange and Vodafone, to social networking and messaging offered by Telefonica (tuenti), to VoIP services offered by O2 (Tu Go), telcos themselves are significant players in the offering of “OTT” and cloud services. Business services have long decoupled access provisions from services/SaaS – indeed, Microsoft partners with a number of telcos to offer cloud services to anyone, not just their own broadband subscribers.

Rather than try to promote any one deconstructed component of the Internet, such as last mile networks, BEREC should fully acknowledge the significant contributions of services, applications, and content provided at all levels and by all providers in the Internet ecosystem, and it should orient its strategy and work programme accordingly.

² See *Investment in Networks, Facilities, and Equipment by Content and Application Providers*, Analysis Mason Report (Sept. 2014), available at <http://www.analysismason.com/CAP-Internet-Sept2014>.

INNOVATION AS A STRATEGIC PRIORITY

To fully effectuate a paradigm shift toward affirming and promoting value at all levels of the Internet ecosystem, BEREC should strengthen and deepen its commitment to innovation as a strategic objective. The *BEREC Strategy 2015-2017* document identifies “Supporting Innovation” as a component of its “Promoting Competition and Investment” strategic priority, which is encouraging and a good start. However, Microsoft encourages BEREC not merely to include innovation as a component of promoting competition and investment, but to elevate innovation to a strategic priority in its own right.

It is widely accepted that innovation enabled by widespread Internet connectivity is a significant driver of economic growth³. The development of the cloud and even the Internet generally is a direct result of an innovation-focused regulatory approach. An “innovation first” regulatory approach would be a significant touchstone to drive the development of network infrastructure as well as achieve critical communications policy goals. Such an approach also would serve as a broad incubator for innovation throughout society. Microsoft’s cloud services promote competition, innovation, and economic growth by helping consumers and businesses be more productive, and by generating upstream and downstream opportunities for the thousands of organizations that make up Microsoft’s partner ecosystem. These partners include, for example, the companies that sell devices running Microsoft’s online tools and solutions, developers who write applications for Microsoft’s online platforms, and service firms that install and manage Microsoft-based services and applications at business customers’ premises, in public

³ See Tennenhouse and Gillet, *supra*.

administrations, in schools, etc. The potential for these entities to drive innovation and economic activity is significant.

Microsoft urges BEREC to drive policy to achieve an environment in which innovation is not only preserved, but accelerated. BEREC should adopt policies and strategies that preserve the online development model of “*permissionless innovation*” that has allowed the Internet and communications in general to thrive, with more services, higher quality products and lower prices. Conversely, BEREC should guard against proposals that, under the guise of protecting or encouraging investment, are intended to protect entrenched interests and insulate them from incentives and pressures to innovate. Any other approach that focuses on preservation of incumbent or entrenched interests would be fundamentally contrary to an innovation first regulatory philosophy and ultimately harm the interests of companies that must necessarily adapt to changes in consumer demand.

LEGACY REGULATIONS SHOULD NOT BE APPLIED REFLEXIVELY TO CLOUD AND “OTT” SERVICES

In addition to BEREC adjusting its viewpoint to safeguard and promote innovation at all layers of the Internet, it also should guard against efforts to reflexively apply legacy communications regulations to CAPs and cloud services, whether the services, applications, and content are provided by new entrants or by incumbents. Moving forward, communications regulators should approach the question of regulation through a focus of the policy outcome that needs to be achieved rather than through the lens of the current legacy regulatory framework.

The telecommunications sector has a long history of regulation, driven in part by the high up-front investment costs necessary to build and maintain a nationwide telecommunications

infrastructure (historically, the copper last mile, backhaul and core networks, etc.) which has led to public monopolies or protected private monopolies for much of the 20th century. Even with progressive liberalisation in the 1990s, and the EU local loop unbundling Regulation at the end of 2000, the high barriers to entry for new entrants continued to shield incumbent telecommunications providers from competition across a very large proportion of the EU's geography (cable networks were mostly rolled-out in denser areas). Regulation of this market throughout most of the 20th century had downsides – in particular, it stifled innovation, as was shown by the acceleration of business models and services that occurred when liberalisation began in Europe in the 1990s. But liberalisation also successfully harnessed the market structure and environment to deliver more affordable legacy services for companies and public administrations (leased lines, early data communications, fax), consumers (telephony), and society more broadly (development of dial-up Internet, mobile communications, and subsequently broadband Internet access, multi-play bundles, and all the innovation driven by the Internet).

Careful thought must go into the next generation of regulation in this rapidly changing and complex space. While some of these rules may still be relevant for some aspects of traditional, network-tethered telecommunications service, modern communications often bear little resemblance to traditional “plain old telephone services” both with respect to the features they offer as well as the manner in which they are delivered.

For example, *ex ante* regulatory obligations on enduring telecoms access network bottlenecks should remain complementary to general competition law due to market foreclosure risks associated with the significant market position of one or more telecom operators and where

general competition law is not sufficient to address the problems. This will remain important for example, for access to ducts and poles, access to radio spectrum, physical and virtual access to fixed networks' last mile (and where applicable backhaul), terminating segments of leased lines (offered to businesses who ask for dedicated capacity etc.), and fixed and mobile termination rates as long as economic bottlenecks cannot be overcome. Additional telecommunications regulation over and above addressing economic bottlenecks to achieve general public policy goals should be assessed with a critical view on the public policy objectives that are the motivation for the legislation.

Online services, in particular, by their innovative and often international nature and the level of control and interaction they give users, deserve a fresh approach. Microsoft is particularly concerned with what appears to be a theme in the BEREC document that "OTT" and cloud services should somehow be constrained or regulated specifically to protect or relieve pressure on incumbent network operators. Extending legacy communications regulations to the world of cloud services, particularly under a misguided notion of a "level playing field," would be inappropriate for many of the new services, applications, and content which have been made possible by the Internet, and would be economically and politically difficult to enforce in practice given the global nature of IP networks.

On the contrary, rather than suggesting a reflexive extension of legacy rules, a strategic policy approach should be taken to ensure that regulation is fit for purpose – fit for the 'digital age'. Such an approach requires that policymakers be ready to revisit public policy goals by challenging existing regulations, and by examining whether the premises for such regulation remain appropriate and justified. Indeed, this is just as true for network-tethered

communications services as it is for CAPs. It also is true not only in determining whether regulations should be applied to any particular service, application or content, but also how regulations should be applied. It is imperative that BEREC adopt and promote a technology agnostic approach to compliance with regulatory requirements. What works for a particular service delivered in a particular manner may very well not work for another service delivered in a different manner. Having determined that a particular public policy goal demands adoption of a regulation, regulators should refrain from imposing any particular technical solution for compliance with that regulation. Regulators should define behaviours necessary for or antithetical to important public policy objectives. The technical means for achieving those public policy objectives should come from industry, and, where appropriate, standards bodies.

Today's innovations in cloud services and online communications have largely been driven by the industry's response to customer and general demand. Because regulators in Europe and other regions decided largely to refrain from applying (sector specific) regulations to online services, the sector has been able to deliver value to consumers, businesses, and public administrations in new and inventive ways and to foster a continuous cycle of innovation throughout the entire Internet ecosystem. Many of the traditional telecommunications regulations that were adopted decades ago were intended to address, among other things, the scarcity of spectrum and high barriers to entry that resulted in limited choices in service providers and content. In an online environment, however, users enjoy an abundance of providers and choices beyond network-tethered communications services. Regulations intended to address the limited number of network-tethered communications service offerings are not as relevant in

an online environment in which consumers can seek a variety of content, applications and communications services from many different sources.

At the same time, consumers are not unprotected. The European Union has developed a strong consumer protection framework that is applicable to all products and services delivered within the Single Market. Those horizontally applicable consumer protection laws aim to provide consumers with protections based on the fundamental principles of information, transparency, fairness, and redress and have proven to be future-resistant.

PRESERVING AN OPEN INTERNET

Microsoft fully supports BEREC's emphasis on preserving robust protections for an open Internet. There is no question that an open Internet is critical to encouraging innovation and maintaining a strong and vibrant economy. However, just as use of the Internet as a distribution channel for content and services has brought more choice and competition, it has inadvertently also effected new challenges. In the digital age, and especially when it comes to information and content delivered over the Internet, unhindered access to online platforms and services is a prerequisite. Microsoft shares the concerns expressed by the EU High Level Group on Media Pluralism in its recent Recommendation that the *"dominant position held by some network access providers or internet information providers should not be allowed to restrict media freedom and pluralism. An open and non-discriminatory access to information by all citizens must be protected in the online sphere, if necessary by making use of competition law and/or enforcing a principle*

*of network and net neutrality*⁴⁴. Network operators should not be able to unduly favour their own content, applications or services, or the content, applications, and services of third parties with whom they have negotiated arrangements, while discriminating against third party unaffiliated content, applications and services. When users buy ‘Internet access’, users themselves should decide how they use it. Network operators should not be able to choose what content, applications or services users can access and distribute, or pick who succeeds or fails in the markets for Internet content, services, and applications.

EU rules enforcing net neutrality are long overdue. Net neutrality rules are significant for societal as well as economic well-being. The principle of net neutrality has emerged in the Connected Continent legislative package as an important focus for principle-based regulation in the field of Internet access, taking account of the fact that not just an incumbent monopoly, or duopoly, but even a tight oligopoly of those controlling last mile network access, have incentives to restrict Internet access for rent-seeking motives.

Microsoft’s longstanding commitment to ensuring that the Internet remains an open platform for competition, innovation, and economic growth is based in part on Microsoft experiencing firsthand the blocking, degrading, and impairing of consumer access to lawful online products and services at the hands of some broadband access providers, particularly in jurisdictions without open Internet protections. Indeed, according to the joint investigation conducted by BEREC and the EC, a significant proportion of European citizens are affected by undue restrictions on the use of many online content, application, and service offerings, such as

⁴⁴“A free and pluralistic media to sustain democracy”, independent report from the EU High Level Group on Media Freedom and Pluralism, January 2013;
http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf

Voice over IP (VoIP) or Peer to Peer (P2P), a technology commonly used to distribute media content)⁵. And, there are growing signs that mobile broadband operators throughout Europe are establishing discriminatory walled garden arrangements for particular online services, applications, and content chosen by the operators. Allowing preferential arrangements for some Internet traffic would be incompatible with the fundamental principles of an open Internet. These arrangements (as opposed to reasonable network management) distort the marketplace and improperly influence subscribers' decisions in selecting content, applications and services.

Preferential transmission arrangements could also chill deployment of faster, more reliable broadband access services to European consumers and professional users over time. Instead of offering their subscribers broadband access packages with faster, more reliable service and increased data allowances, preferential transmission arrangements would incentivize broadband access providers to add new capacity and network improvements only to meet contractual commitments contained in existing or anticipated preferential transmission arrangements and to enter into more of these potentially lucrative deals.

BEREC must strive to preserve an environment in which online innovations are not limited because it becomes artificially more expensive to access and use them, or because online providers are 'forced' into concluding a deal for distribution via a managed service with an access provider, due to the quality of delivery of the open Internet having become increasingly and comparatively sub-standard compared to 'managed services'. Such cases would have a significant negative impact on innovation and content creation, growth, and user choice.

⁵ BEREC: "A view of traffic management and other practices resulting in restrictions to the open Internet in Europe", 29 May 2012; http://erg.ec.europa.eu/doc/consult/bor_12_30.pdf

BEREC should also continue to monitor closely whether broadband access providers circumvent open Internet principles through peering, paid peering, or other forms of interconnection agreements. Similarly, it should continue to monitor whether broadband access providers undermine core open Internet objectives through their specialized services. It should also continue to push for appropriate disclosure and transparency practices and rules. Ensuring that broadband access providers' practices are transparent is critical to allowing stakeholders and the larger Internet community to identify any activities that undermine the openness of the Internet.

An open Internet framework will preserve a competitive playing field in which users—not broadband access providers—decide which content, applications, and services succeed in the marketplace. This framework is critical not only to the successful investment in and deployment of high-speed broadband access services but also to economic growth, leadership in innovation, and longstanding commitment to free expression, robust competition, and democratic ideals.

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Microsoft thanks BEREC for facilitating a discussion concerning BEREC's strategy and work programme. Please contact Cornelia Kutterer (cokutter@microsoft.com) with questions or for more information.